

**Mercury Distribution Carriers, Inc. and Teamsters
Local 676, affiliated with International Brotherhood of Teamsters, AFL-CIO, Petitioner.**
Case 4-RC-18103

September 30, 1993

DECISION AND DIRECTION

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND RAUDABAUGH

The National Labor Relations Board has considered determinative challenges in an election held June 9, 1993, and the Regional Director's report recommending disposition of them. The election was held pursuant to a Stipulated Election Agreement approved by the Regional Director on May 13, 1993. The tally of ballots shows 9 for and 8 against the Petitioner, with 2 challenged ballots, a number sufficient to affect the election results.

The Board has reviewed the record in light of the exceptions¹ and brief and has adopted the Regional Director's findings and recommendations.

¹ In the absence of exceptions, we adopt, pro forma, the Regional Director's recommendation that the challenge to the ballot of Wil-

DIRECTION

IT IS DIRECTED that the Regional Director for Region 4 shall, within 14 days of the date of this Decision and Direction, open and count the ballots of William Tinney and Gerald Allamby, and prepare and serve on the parties a revised tally of ballots. Thereafter, the Regional Director shall issue the appropriate certification.

liam Tinney should be overruled and that his ballot should be opened and counted.

In its exceptions, the Employer asserts that the Regional Director's report contains certain factual discrepancies related to Allamby's terms and conditions of employment. Specifically, the Employer, through affidavits attached to its exceptions, maintains that Allamby does not call the Employer every day to find out if work is available and has declined work on more than one or two instances. Even accepting these factual assertions, we reach the same result as the Regional Director. In *Tri-State Transportation Co.*, 289 NLRB 356 (1988), the Board held, inter alia, that an employee's ability to decline work "is not determinative of their employment status so as to exclude them from the unit." Accordingly, even assuming that Allamby does not call the Employer every day seeking work and even assuming that he has declined work on more than "one or two instances," the Regional Director properly found him to be includable in the unit as a regular part-time employee.